UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

COLIBRI CORPORATION, Plaintiff,	:	
v.	:	CA 03-523T
CURLY & SMOOTH HANDELS GmbH, Defendant.	:	

REPORT AND RECOMMENDATION

David L. Martin, United States Magistrate Judge

Before the court is Defendant's Motion to Dismiss ("Motion to Dismiss") (Document #9). Defendant Curly & Smooth Handels Gmbh ("Defendant" or "C&S") asserts that C&S lacks the requisite minimum contacts with the State of Rhode Island for this court to exercise personal jurisdiction over C&S. See Motion to Dismiss at 1. This matter has been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and D.R.I. Local R. 32(a). A hearing was held on July 2, 2004. After listening to oral argument, reviewing the memoranda submitted, and performing independent research, I recommend that the Motion to Dismiss be granted.

Facts

This is an action for breach of contract, declaratory judgment, and injunctive relief. See First Amended Complaint (Document #2) ¶¶ 13-21. Plaintiff Colibri Corporation ("Plaintiff" or "Colibri"), a company located in Providence, Rhode Island, manufacturers and markets cigar lighters and other smoking accessories through a network of distributors. See Affidavit of Frederick N. Levinger ("Levinger Aff.") ¶ 2. Defendant C&S is a German company with a principal place of business in Munich, Germany. See Affidavit of Jürgen Bleich in Support of Defendant's Motion to Dismiss ("Bleich Aff.") ¶ 2.

C&S manufactures, markets, and distributes various consumer products, including lighters, other smoking accessories, and writing instruments, in Europe. See Bleich Aff. ¶ 2.

Prior to June of 1998, C&S served as a distributor of cigarette lighters in Germany for the Ronson Corporation ("Ronson"), an English company located in Crawley, Sussex, United Kingdom. See id. ¶ 3. The distributorship had been arranged by an English business operated by the Hodgson family ("Hodgson"), also based in England, which was the distributor of Ronson consumer products throughout Europe. See id. C&S infers (and Colibri apparently does not dispute) that Colibri asked Hodgson to market Colibri products outside of the United States and that, as a result of this request, sometime before June of 1998, Hodgson formed an entity called Colibri Corporation Limited (an English company which to avoid confusion will be referred to hereafter as "Hodgson-Colibri"), which was a foreign subsidiary of Colibri. See id. ¶ 4.

Around June of 1998, Hodgson-Colibri and C&S entered into a written agreement (the "1998 Agreement") pursuant to which C&S agreed to distribute Colibri consumer products in Germany, Austria, and Switzerland (the "Territory"). See id. Prior to this time, Colibri had no distribution of its products in the Territory. See id. ¶ 5.

Pursuant to the 1998 Agreement with Hodgson-Colibri, C&S served as a distributor for Colibri products in the Territory from approximately June 1998 to July 2001 (the "Initial Distribution Period"). See id. During the Initial Distribution Period, C&S had minimal direct contact with Colibri. See id. ¶ 6. All distribution transactions were handled through Hodgson-Colibri located in England. See id. C&S met regularly with

Howard Hodgson, Jr.,[1] at the trade fair for lighters and smoking accessories in Frankfurt, Germany. See Bleich Aff. ¶ 7. For most of the Initial Distribution Period, C&S did not meet directly with any representative of Colibri. See id. Near the end of the Initial Distribution Period, C&S met with Colibri's president, Fred Levinger ("Levinger"), at a business event held in Frankfurt. See id.

Eventually, Colibri ceased using Hodgson-Colibri for its European distribution of consumer products and handled such distribution through its international sales department based in Rhode Island. See id. ¶ 8. A representative from Colibri's international sales division visited C&S twice a year in Munich and met C&S representatives at the Frankfurt trade show on two occasions. See id. ¶ 9. Levinger and his assistant, Mike Reynolds, attended the Frankfurt trade show once a year. See id. Colibri requested that C&S expand the Territory to include the Netherlands, and C&S agreed to this expansion. See id.

On July 1, 2001, Colibri and C&S entered directly into a distributorship agreement (the "2001 Agreement") which gave C&S the sole right to distribute certain Colibri lighters and other products in the Territory.[2] Levinger Aff. ¶ 4. Paragraph 13 of the 2001 Agreement included the following sentence:

> This agreement is made and entered into and subject to and shall be construed and governed by the laws of the State of Rhode Island (USA).

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[1] Howard Hodgson, Jr., is presumably a member of the Hodgson family. See Affidavit of Jürgen Bleich in Support of Defendant's Motion to Dismiss ("Bleich Aff.") ¶¶ 3, 7.

[2] Although the first sentence of the 2001 Agreement states that "THIS AGREEMENT is made the FIRST day of July 1, 2001 (sic)...," Affidavit of Frederick N. Levinger ("Levinger Aff."), Exhibit ("Ex.") 1 at 1, the document was not actually signed by the parties until 2002, see id. at 7. This fact does not affect the court's determination of the instant Motion.

Levinger Aff., Exhibit ("Ex.") 1 at 7. However, C&S did not negotiate or sign this contract in Rhode Island. See Bleich Aff. ¶ 11. All communication between the parties was accomplished through e-mail or by telephone. See id. C&S signed the 2001 Agreement at a trade show in Frankfurt, Germany, in the presence of a Colibri representative. See id. The 2001 Agreement was for a period of five years. See Levinger Aff., Ex. 1 at 2. Thereafter, it was to continue from year to year, unless terminated by either party on three months notice. See id.

The amount and nature of the contact which C&S had with Colibri during the time the 2001 Agreement was in effect is described in the affidavit of Colibri's president, Mr. Levinger:

> 6. **During the [2001] Distributorship Agreement Curly & Smooth purchased Colibri products by directly contacting Colibri's international sales department in Cranston, Rhode Island**. Curly & Smooth's Managing Director, Jurgen Bleich, frequently wrote to Colibri employees in Cranston to place orders .... Products purchased by Curly & Smooth were shipped from Cranston to Germany ....
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> ....
>
> 14. Curly & Smooth continued [after February 21, 2003] to contact Colibri in Rhode Island and continued to purchase lighters and other items from Colibri in Rhode Island. Colibri continued to ship product from Rhode Island to Germany.

Levinger Aff. ¶¶ 6, 14 (bold added).[3]

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[3] Curly & Smooth Handels GmbH ("C&S" or "Defendant") appears to dispute some of these facts. Jürgen Bleich, a managing director of C&S, affirms in his affidavit that:

> 12. Colibri appointed a European manager with an office in London in or about June, 2002. **From that point, all of C&S' communications with Colibri, and all of the distribution transactions, were handled though Colibri's office in London**.

Mr. Bleich visited Colibri in Rhode Island once. See Levinger Aff. ¶ 8; Bleich Aff. ¶ 14. C&S also sent a mechanic to Colibri's Rhode Island facility on one occasion for training. See id. Apart from these two visits, no one from C&S went to Rhode Island during the entire relationship with Colibri. See Bleich Aff. ¶ 14. In 2002, Mr. Bleich met with Colibri executives in Las Vegas during a convention, and they discussed their business relationship. See Levinger Aff. ¶ 8. C&S transacted no other business with any United States or Rhode Island entity while it had a commercial relationship with Colibri. See Bleich Aff. ¶ 15.

During 2002, problems developed in the relationship between C&S and Colibri. See Levinger Aff. ¶ 9. Colibri believed that C&S "was copying and selling Colibri products in violation of Colibri's intellectual property rights." Id. In addition, Colibri alleges that C&S was "consistently late in its payments to Colibri by as much as 200 days." Id. The two companies exchanged correspondence concerning unpaid invoices and other business matters. See id. C&S complained that Colibri had not made its full line of products available to C&S and that there were problems with deliveries, product quality, and the

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> 13. The original European manager was soon replaced by Chris Howard, who took over the London office. Meetings with the European managers were held once a year at the Frankfurt trade fair. Most of the communication took place by phone or email. Chris Howard came to the C&S offices in Munich only once.

Bleich Aff. ¶¶ 12-13 (bold added). For purposes of this Report and Recommendation, the court accepts as true the facts as affirmed by Colibri's president, Mr. Levinger. See Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 290 F.3d 42, 51 (1st Cir. 2002) (instructing that the court "must accept the plaintiff's (properly documented) evidentiary proffers as true for the purpose of determining the adequacy of the prima facie jurisdictional showing.").

availability of spare parts. See Bleich Aff. ¶ 19.

Colibri wrote to C&S on January 8, 2003, and advised that it was considering termination of the relationship. See Levinger Aff. ¶ 10. During that same month, C&S sent a proposed Memorandum of Understanding (the "Memorandum") to Colibri in Rhode Island that would have amended the 2001 Agreement in a number of respects. See id. ¶ 12. Among the proposed changes was a choice of law clause that would apply German law and give German courts exclusive jurisdiction. See id. Colibri rejected the proposed Memorandum. See id.

A meeting between the parties was arranged for the end of January at the Frankfurt trade show. See Bleich Aff. ¶¶ 19-20. As a result of the meeting, the parties believed that they had resolved their differences. See id. ¶ 20. Representatives of C&S and Colibri signed a two page document on February 23, 2003, memorializing their agreement and revising the 2001 Agreement in certain respects, but leaving the original choice of law provision undisturbed.[4] See id.; Levinger Aff. ¶ 13.

Unfortunately, within a few months problems again arose between the parties. See Levinger Aff. ¶ 15; Bleich Aff. ¶ 22. Colibri notified C&S in June of 2003 that it was in breach of the 2001 Agreement for failing to make timely payment. See Levinger Aff. ¶ 15. On July 7, 2003, Colibri sent C&S an e-mail, advising that it was terminating the 2001 Agreement because C&S had not fulfilled its payment obligations. See id. Colibri also sent a letter to all of C&S' customers, notifying them of the termination of the distributor relationship. See Bleich Aff. ¶ 22. C&S claims that this action severely impaired its business

[4] The affidavits and exhibits submitted by the parties do not indicate where the two page document which amended the 2001 Agreement was signed. However, there is nothing to suggest that C&S signed it in Rhode Island or even in the United States.

relations. See id.

Travel

Colibri filed this action on November 17, 2003, and filed a First Amended Complaint on February 6, 2004. C&S was served on or about March 3, 2004. See Document #8. On April 12, 2004, the parties filed a stipulation giving C&S up to and including May 11, 2004, to answer or otherwise respond to the First Amended Complaint. See Document #7. The instant Motion to Dismiss was filed on May 11, 2004. C&S's objection (Document #11) was filed on May 28, 2004.[5]

Discussion

I. Motion to Dismiss

A. Personal Jurisdiction Standard

For motions to dismiss for lack of personal jurisdiction, the most commonly employed standard in the early stages of litigation is the "prima facie" standard. See Rodriguez v. Fullerton Tires Corp., 115 F.3d 81, 84 (1st Cir. 1997); Boit v. Gar-Tec Prods., Inc., 967 F.2d 671, 675 (1st Cir. 1992). Under the prima facie standard, the plaintiff bears the burden of proving through credible evidence that the claim satisfies both the state's long-arm statute[6] and constitutional due process.

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[5] In December of 2003, C&S filed suit against Colibri in the Munich District Court. See Bleich Aff. ¶ 23. In that action C&S alleges that Colibri wrongfully and intentionally interfered with its advantageous business relations and that C&S has been damaged as a result. See id. ¶ 24. C&S also seeks an injunction prohibiting Colibri from interfering with its customers. See id. The Munich action has been served on Colibri's London office, which is also a defendant, and is in the process of being served in Rhode Island. See id.

[6] The Rhode Island long-arm statute provides:

> Every foreign corporation, every individual not a resident of this state ... and every partnership or association, composed of any person or persons not such residents, that shall have

See Rodriguez at 83-84; see also Sawtelle v. Farrell, 70 F.3d 1381, 1387 (1st Cir. 1995); Boit v. Gar-Tec Prods., Inc., 967 F.2d at 675. "To make this prima facie showing, the plaintiff cannot rest upon mere averments, but must adduce competent evidence of specific facts." Barrett v. Lombardi, 239 F.3d 23, 26 (1st Cir. 2001); accord Microfibres, Inc. v. McDevitt-Askew, 20 F.Supp.2d 316, 319-20 (D.R.I. 1998). The court will not act as a fact finder with respect to the evidence, but will accept properly supported proffers of evidence as true. See Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 290 F.3d 42, 51 (1st Cir. 2002); Boit, 967 F.2d at 675; see also Northeastern Land Servs., Ltd. v. Schulke, 988 F.Supp. 54, 56 (D.R.I. 1997) (same).

B. Personal Jurisdiction

There are two types of personal jurisdiction: general and specific. See United Elec. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1088 (1st Cir. 1992).

1. General Jurisdiction

General jurisdiction only applies where the defendant's in-state activities "are so substantial and of such a nature that they will justify a lawsuit against [the defendant] on causes of action distinct from those activities." Microfibres, Inc., 20 F.Supp.2d at 320 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945)). The defendant's in-state activities must be both "continuous and systematic." United Elec. Workers, 960 F.2d at 1088. The general jurisdiction

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> the necessary minimum contacts with the state of Rhode Island, shall be subject to the jurisdiction of the state of Rhode Island ... in every case not contrary to the provisions of the constitution or laws of the United States.

R.I. Gen. Laws § 9-5-33(a) (1997 Reenactment).

standard is considerably more stringent than the standard for specific jurisdiction. See Barry v. Mortgage Servicing Acquisition Corp., 909 F.Supp. 65, 74 (D.R.I. 1995). "The continuous and systematic requirement has been characterized as being satisfied when the defendant's forum contacts are extensive and pervasive." Id. at 75 (citations and internal quotation marks omitted). Here it is obvious that C&S's in-state activities are not "continuous and systematic," United Elec. Workers, 960 F.2d at 1088, and that general jurisdiction is not present. Colibri does not contend otherwise. See Memorandum of Law in Support of Objection to Motion to Dismiss ("Colibri Mem.") at 5.

2. Specific Jurisdiction

Specific jurisdiction applies where "the cause of action arises directly out of, or relates to, the defendant's forum-based contacts." United Elec. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1088-89 (1st Cir. 1992). For a court properly to exercise specific personal jurisdiction over the defendant, the requirements of both the state's long-arm statute and the United States Constitution must be satisfied. See Barrett v. Lombardi, 239 F.3d 23, 26 (1st Cir. 2001); Pritzker v. Yari, 42 F.3d 53, 60 (1st Cir. 1994). The Rhode Island long-arm statute, as interpreted by the Supreme Court of Rhode Island, is coextensive with federal due process mandates. See Levinger v. Matthew Stuart & Co., Inc., 676 F.Supp. 437, 439 (D.R.I. 1988)(citing Conn v. ITT Aetna Fin. Co., 252 A.2d 184, 186 (R.I. 1969)); see also Microfibres, Inc. v. McDevitt-Askew, 20 F.Supp.2d 316, 320 (D.R.I. 1998). Therefore, Fourteenth Amendment due process requirements determine the exercise of personal jurisdiction in the District of Rhode Island. See Levinger, 676 F.Supp. at 439; Northeastern Land Servs., Ltd. v. Schulke, 988 F.Supp. 54, 57 (D.R.I. 1997).

"Due process demands minimum contacts between a nonresident defendant and the forum such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Northeastern Land Servs., Ltd., 988 F.Supp. at 57 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945)). The First Circuit applies a three-part analysis in evaluating minimum contacts. See Phillips Exeter Acad. v. Howard Phillips Fund, Inc., 196 F.3d 284, 288 (1st Cir. 1999); Sawtelle v. Farrell, 70 F.3d 1381, 1388-89 (1st Cir. 1995).

> First, the claim underlying the litigation must directly arise out of, or relate to, the defendant's forum-state activities. Second, the defendant's in-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's courts foreseeable. Third, the exercise of jurisdiction must, in light of the Gestalt factors, be reasonable.

Sawtelle, 70 F.3d at 1389 (quoting United Elec. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1089 (1st Cir. 1992)). The "Gestalt factors," id. at 1394, are: "(1) the defendant's burden of appearing; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the judicial system's interest in obtaining the most effective resolution of the controversy; and (5) the common interests of all sovereigns in promoting substantive social policies," id. (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477, 105 S.Ct. 2174, 2184-85, 85 L.Ed.2d 528 (1985)).

a. Relatedness

The first of the three requirements for specific jurisdiction centers "on the causal nexus between [the defendant's] forum-based contacts and the harm underlying [the

plaintiff's] complaint." Northeastern Land Servs., Ltd. v. Schulke, 988 F.Supp. 54, 57-58 (D.R.I. 1997); see also Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 206 (1st Cir. 1994)(same). In its First Amended Complaint, Colibri alleges that C&S has breached the 2001 Agreement by continuing to sell Colibri products more than ninety days after its termination (Count I). See First Amended Complaint ¶ 14. Colibri also seeks a declaratory judgment that C&S has breached the 2001 Agreement and that C&S has no legal right to sell Colibri products (Count II). See id. ¶ 18. Lastly, Colibri alleges that C&S has continued to sell Colibri products in violation of the 2001 Agreement and has continued to represent that it has a relationship with Colibri. See id. ¶ 20. These actions have allegedly caused Colibri to lose good will with its current distributor and created confusion in the marketplace as to Colibri's authorized distributor. See id. Colibri seeks to enjoin C&S from selling any Colibri products or representing that it has a relationship with Colibri. See id. ¶ 21.

Colibri asserts that "when the claim at issue involves the breach of contract entered into in the forum state, the answer to the question of relatedness is a 'straightforward yes.'" Plaintiff's Mem. at 5 (quoting Jet Wine & Spirits, Inc. v. Bacardi & Co., 298 F.3d 1, 10 (1st Cir. 2002)). Colibri reads too much into this isolated quotation from Jet Wine and overlooks several distinguishing facts between that case and the instant action. As C&S points out, in Jet Wine the First Circuit

> found satisfaction of the relatedness test because of the alleged unlawful conduct of the defendant *in the forum state*, not merely based upon the existence of the contract. Specifically, the *Jet Wine* court noted that the defendant (i) had assumed a liquor distribution contract that its predecessor had performed in New Hampshire by shipping alcoholic beverages to plaintiff

> for distribution in that state, and (ii) had delivered a contract termination letter, which, *inter alia*, formed the basis for the suit, to plaintiff in New Hampshire. See *Jet Wine*, *supra*, 298 F.2d at 10.

Reply Memorandum in Support of Defendant's Motion to Dismiss ("Reply Mem.") at 3 n.1. Here, Colibri has alleged no unlawful conduct occurring within the State of Rhode Island.

To the extent that Colibri contends that the existence of a contract between the parties is by itself sufficient to satisfy the element of relatedness, see Plaintiff's Mem. at 5 (appearing to so argue), that argument is rejected. "[T]he mere existence of a contractual relationship between an out-of-state defendant and an in-state plaintiff does not suffice, in and of itself, to establish jurisdiction in the plaintiff's home state." Phillips Exeter Acad. v. Howard Phillips Fund, Inc., 196 F.3d 284, 290 (1st Cir. 1999)(citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478-79, 105 S.Ct. 2174, 2185, 85 L.Ed.2d 528 (1985)).

> [A] contract is ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction. It is these factors-**-prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing--that must be evaluated** in determining whether the defendant purposefully established minimum contacts within the forum.

Burger King Corp., 471 U.S. at 479, 105 S.Ct. at 2185 (internal citations and quotation marks omitted)(emphasis added). The First Circuit has instructed that "[i]n contract cases, a court charged with determining the existence *vel non* of personal jurisdiction must look to the elements of the cause of action and ask whether the defendant's contacts with the forum were instrumental either in the formation of the contract or in its breach." Phillips Exeter Acad., 196 F.3d at 289.

In the instant case, there is virtually no evidence that C&S's contacts with Rhode Island were instrumental in the formation of the 2001 Agreement. Rather, the 2001 Agreement was the result of the prior relationship created by the 1998 Agreement, see Bleich Aff. ¶¶ 5-10, and during the Initial Distribution Period (from June 1998 until July 2001) C&S "had little or no direct contact with Colibri," id. ¶ 6. Similarly, it cannot be said that C&S's contacts with Rhode Island were instrumental in the breach of the 2001 Agreement. Colibri claims that C&S breached the 2001 Agreement by continuing to sell Colibri products beyond the ninety days following termination and by holding itself out as a distributor of Colibri products. See First Amended Complaint ¶ 12. If these breaches occurred, they occurred in Europe and not in Rhode Island. Thus, the court finds that C&S's contacts with Rhode Island were instrumental neither in the formation of 2001 Agreement nor in its alleged breach.

Colibri also appears to argue that the 2001 Agreement "had substantial connection," Plaintiff's Mem. at 5 (quoting McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223, 78 S.Ct. 199, 201, 2 L.Ed.2d 223 (1957)), with Rhode Island. The basis for this contention appears to be: 1) that "Colibri's primary claim against [C&S] is for the breach of a multi-year distributorship agreement that by its very terms was 'made and entered into' in the State of Rhode Island," id. (quoting ¶ 13 of the 2001 Agreement); and 2) that "the claim concerns the improper sale of products that [C&S] ordered from Rhode Island pursuant to the [2001 Agreement] and that it received from Colibri's international distribution center in Rhode Island," id. The court does not agree that these facts are enough to give the 2001 Agreement a "substantial connection," McGee, 335 U.S. at 223, 78 S.Ct. at 201, with Rhode Island. Given that the negotiation and

execution of the contract on the part of C&S was all accomplished without anyone from C&S actually setting foot in Rhode Island, the recitation in the document that it was "made and entered into" in Rhode Island sounds of boilerplate and is entitled to little weight. There is no statement that C&S agreed to submit to jurisdiction in Rhode Island, a provision which this court believes would have been present if that were the intention of the parties. While the fact that the goods were ordered from the Colibri plant in Rhode Island is of more significance, it still is insufficient to allow this court to fairly say that the contract had a "substantial connection" with Rhode Island.

In short, the court finds that there is little or no relationship between the litigation and C&S's forum state activities. The harm underlying Colibri's First Amended Complaint is based solely on acts allegedly committed by C&S in Europe and not in Rhode Island. Accordingly, Colibri has not satisfied the relatedness element of the three part test.

b. Purposeful Availment

The second component of the three part test, purposeful availment, serves "to assure that personal jurisdiction is not premised solely upon a defendant's 'random, isolated, or fortuitous' contacts with the forum state." Sawtelle v. Farrell, 70 F.3d 1381, 1391 (1st Cir. 1995)(quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790 (1984)); see also Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985) (explaining how defendant's contacts must qualify as "invoking the benefits and protections of [the forum state's] laws"). The goal is to identify in-state activity "that would make the exercise of jurisdiction fair, just, or reasonable." Rush v. Savchuk, 444 U.S. 320, 329, 100 S.Ct. 571, 577, 62 L.Ed.2d 516 (1980). The kind of purposeful availment necessary in the First

Circuit requires in-state conduct by the defendant which is both **voluntary** and which makes it reasonably **foreseeable** that the defendant might be sued in the forum. See Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 207 (1st Cir. 1994).

Furthermore, the voluntariness and foreseeability of the defendant's contacts depend on whether the defendant participated in the economic life of the forum and not just on the fact that the defendant formed a contract with the resident plaintiff. See Bond Leather Co., Inc. v. Q.T. Shoe Mfg. Co., Inc., 764 F.2d 928, 933 (1st Cir. 1985)(quoting Whittaker Corp. v. United Aircraft Corp., 482 F.2d 1079, 1084 (1st Cir. 1973)); cf. McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223, 78 S.Ct. 199, 201, 2 L.Ed.2d 223 (1957)(holding it sufficient for purposes of due process that the defendant had participated in the economic life of the state and the contract had a substantial connection with the state).

i. Voluntariness

It is clear that C&S voluntarily entered into the relationship with Colibri and that the relationship ultimately resulted in the formation of the 2001 Agreement. However, this fact will not by itself satisfy the purposeful availment prong. See Phillips Exeter Acad. v. Howard Phillips Fund, Inc., 196 F.3d 284, 292 (1st Cir. 1999)("Without evidence that the defendant actually reached out to the plaintiff's state of residence to *create* a relationship--say by solicitation, *see, e.g., Nowak,* 94 F.3d at 716-17--the mere fact that the defendant willingly entered into a tendered relationship does not carry the day."); Northeastern Land Servs., Ltd. v. Schulke, 988 F.Supp. 54, 58 (D.R.I. 1997) Here, there is no evidence that C&S reached out to Colibri. Rather, the opposite is true.

ii. Foreseeability

The foreseeability component of purposeful availment

requires that defendants have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S.Ct. 2174, 2182, 85 L.Ed.2d 528 (1985)(citing Shaffer v. Heitner, 433 U.S. 186, 218, 97 S.Ct. 2569, 2587, 53 L.Ed.2d 683 (1977)(Stevens, J., concurring in judgment))(alteration in original). When a defendant intentionally directs activities at the forum state which relate to the alleged claims, there is such fair warning. See id. (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790 (1984), and Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404 (1984)). Here the activities which C&S directed toward Rhode Island, i.e., correspondence and e-mail relating to orders for products and the visits by two C&S employees, do not relate directly to the claims alleged in the First Amended Complaint. Those claims all relate to C&S's activities in Europe.

Colibri argues that the following voluntary contacts by C&S with Rhode Island support the exercise of jurisdiction: "enter[ing] into a multi-year relationship ... [as] an exclusive distributor of Colibri products," Plaintiff's Mem. at 6; sending correspondence and orders for products to Colibri in Rhode Island, see id.; having Mr. Bleich and a mechanic each make a visit to Rhode Island, see id.; and agreeing to maintain regular frequent contacts with Colibri, see id. Colibri contends that these contacts are similar to those which this court in Brian Jackson & Co. v. Eximias Pharmaceutical Corp., 248 F.Supp. 36 (D.R.I. 2003), found supported the exercise of personal jurisdiction. See Plaintiff's Mem. at 6. However, Brian Jackson is distinguishable. The "core allegations in Jackson's suit," Brian Jackson Co., 248 F.Supp. at 35, arose, for the most part, out of activities occurring in Rhode Island, see id. Here the

core allegations of Colibri's suit all relate to activities occurring in Europe. See First Amended Complaint ¶¶ 14-21. In Brian Jackson, the defendant "urged [the plaintiff] to conduct business out of his office in Rhode Island, rather than travel to Pennsylvania, as a cost saving measure." Brian Jackson, 248 F.Supp.2d at 36. The court noted that the defendant "might well have anticipated that encouraging [the plaintiff] to perform his contractual duties in Rhode Island substantially increased its ties to Rhode Island." Id. Thus, there was evidence of "a voluntary decision by the defendant to inject itself into the local economy as a market participant." Id. at 35-36. In contrast, there is no evidence of a similar decision by C&S.[7]

Moreover, the opinion in Brian Jackson at least suggests that the defendant in that case initiated the contact with the plaintiff. See id. at 36 ("Even in cases where the defendant was not physically present in the forum, **where the defendant initiated the transaction by mailing or calling the plaintiff in the forum** and when the defendant contemplated that the plaintiff would render services in the forum ... many courts have found jurisdiction.")(quoting Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 290 F.3d 42, 62 (1st Cir. 2002))(bold added). As previously noted, here Colibri reached out to C&S, not the other way around. Finally, the court in Brian Jackson noted that "personal jurisdiction involves the power of this Court to compel [the defendant] to abide by its decrees." Id. at 35 n.3. The proposition that this court can compel a German

[7] The fact that in early 2003 Colibri rejected a proposed Memorandum of Understanding from C&S which would have given German courts exclusive jurisdiction, see Levinger Aff. ¶ 12, may be evidence of what Colibri contemplated the relationship between the two companies would be as of that date. It is not, however, evidence of what the parties contemplated the relationship would be as of the time they entered into the 2001 Agreement.

company to do or cease doing something in Germany and three other European countries is, to say the least, less than self-evident.

In sum, this court agrees that "C&S neither reached out to voluntarily avail itself of the benefits of Rhode Island law, nor could it foresee that performing services in Europe at the soliciting party's request would permit C&S to be haled into court in Rhode Island." Reply Mem. at 5-6 (footnote omitted). Accordingly, I find that Colibri has not met its burden of demonstrating purposeful availment by C&S.

c. Gestalt Factors

The third prong of the personal jurisdiction analysis, the Gestalt factors, arises after the establishment of minimum contacts and centers on whether the exercise of jurisdiction is reasonable. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-77, 105 S.Ct. 2174, 2184, 85 L.Ed.2d 528 (1985). Reasonable equates with "fair play and substantial justice." Id. (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 320, 66 S.Ct. 154, 160, 90 L.Ed. 95 (1945)). As the court has concluded that Colibri has satisfied neither the relatedness nor the purposeful availment segments of the test for specific jurisdiction, discussion of the Gestalt factors is not mandatory. See Sawtelle v. Farrell, 70 F.3d 1381, 1394 (1st Cir. 1995)("[A] failure to demonstrate the necessary minimum contacts eliminates the need even to reach the issue of reasonableness ...."); United Elec., Radio & Mach. Workers of America v. 163 Pleasant Street Corp., 960 F.2d 1080, 1091 n.11 (1st Cir. 1992)("The Gestalt factors come into play only if the first two segments of the test for specific jurisdiction have been fulfilled."). However, in the interest of completeness, the court will, nevertheless, address them.

This third portion of the jurisdictional test is not inflexible and varies in accordance with the strength of the

first two parts. That is, "the weaker the plaintiff's showing on the first two prongs (relatedness and purposeful availment), the less a defendant need show in terms of unreasonableness to defeat jurisdiction." Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 210 (1st Cir. 1994). On the other hand, "an especially strong showing of reasonableness may serve to fortify a borderline showing of relatedness and purposefulness." Ticketmaster-New York, Inc., 26 F.3d at 210.

i. Defendant's Appearance Burden

In terms of the burden of defending this suit in Rhode Island, "this factor is only meaningful where a party can demonstrate some kind of special or unusual burden." Pritzker v. Yari, 42 F.3d 53, 64 (1st Cir. 1994). Here, the burden is substantial. C&S has no presence in the United States. See Defendant's Mem. at 12. It has represented that "all of the witnesses related to [the] breach of contract and unlawful competition claims are situated in Europe." Id.

ii. Forum State's Interest

In determining Rhode Island's interest in adjudication, the second factor, this court should assess its legitimacy and "not ... compare [its] interest to that of some other jurisdiction." Foster-Miller, Inc. v. Babcock & Wilcox Canada, 46 F.3d 138, 151 (1st Cir. 1995)(citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 483 n.26, 105 S.Ct. 2174, 2188 n.26, 85 L.Ed.2d 528 (1985), for the proposition that two forums may simultaneously have legitimate interests in the dispute's resolution). While it is true that Rhode Island has an interest in affording relief to companies located in this jurisdiction, here the actual dispute arises because of actions occurring in Germany and the other three European countries. Resolving claims of unlawful competition (which, as C&S notes, is "occurring, if at all, solely in Europe," Defendant's Mem. at 13), in foreign countries

is a matter in which this court has at most a limited interest.

iii. Plaintiff's Interest in Relief

The third factor obviously weighs in favor of Colibri. The aim is to ensure that Plaintiff is able to obtain "convenient and effective relief." Pritzker v. Yari, 42 F.3d 53, 64 (1st Cir. 1994). To achieve this end, a court must generally "accord plaintiff's choice of forum a degree of deference in respect to the issue of its own convenience." Id. (citing Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 211 (1st Cir. 1994)). It is indisputable that it is more convenient for Colibri to litigate this action in Rhode Island. However, Colibri appears to have sufficient resources and experience in conducting international business that it will not be left without a remedy if the instant motion is granted.

iv. Judicial System's Interest

The key to applying this factor is ensuring "the most effective resolution of the controversy." Sawtelle v. Farrell, 70 F.3d 1381, 1395 (1st Cir. 1995). It appears far more likely that a complete resolution of the controversy between the parties can be achieved by a trial in a German court than one in this court.

v. States' Common Interest

To the extent that this factor is applicable, the court finds that it weighs in favor of the exercise of jurisdiction by a German court. As a fundamental social policy, it is desirable that the court which is most concerned with a controversy (i.e., one where the alleged wrongdoing has occurred within its jurisdiction) should adjudicate the dispute.

vi. Summary Re Gestalt Factors

It is apparent that the Gestalt factors do not favor the exercise of jurisdiction by this court. Apart from Colibri's interest in having its choice of forum honored, there is no

reason for this dispute to be heard in this court.

d. Summary Re All Factors

After considering the three prongs, the court finds that none of them has been satisfied. Accordingly, C&S's motion to dismiss should be granted, and I so recommend.

Conclusion

For the foregoing reasons, I recommend that C&S's Motion to Dismiss be granted. Any objections to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten (10) days of its receipt. See Fed. R. Civ. P. 72(b); D.R.I. Local R. 32. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

David L. Martin
United States Magistrate Judge
July 9, 2004